

The Right Honourable Chris Grayling MP  
Lord Chancellor and Secretary of State for Justice  
Ministry of Justice  
102 Petty France  
London  
SW1H 9AJ

9 May 2013

Dear Chris,

When we met on 22 April, we discussed progress on work to explore reform of HMCTS. You explained that the Department's financial position means that these reforms are now essential and work is proceeding at pace.

As you know, we welcome this work, which we hope will help to address (among other things) our concerns about funding for the courts and tribunals system. I am, however, anxious to avoid any misunderstandings about the judiciary's position. We are not in a position to agree any proposals until the details are further developed. In particular, there remains much to be done before we can both be confident that the financial case for proceeding is sound and realistic.

I am grateful for the way that your officials and their external advisers have sought to work closely with us on this process. The attached paper sets out in more detail our assessment of the emerging proposals and issues of principle that will need to continue to be explored.

I look forward to discussing the way forward with you when more detailed proposals have been produced and we have both had time to consider these.

Signed

As ever,

Igor

## ● RESTRICTED HMCTS REFORM JUDICIAL OVERVIEW

### Introduction:

1. The judiciary has for some time been concerned that continuing with the present model for HMCTS, both in governance and financial terms, was not an attractive option for the long term – and likely to become increasingly unattractive as Treasury cut backs and other fiscal constraints have increasing effect. Against that background, the Judiciary responded to the LC's WMS of 26th March in the terms set out in the LCJ's and SPT's Message of the same day and remains fully engaged.
2. Certain matters are or should be axiomatic: no governance or funding models should be countenanced which threatened the independence of the judiciary (from the other branches of the State), the rule of law or access to justice. Further and as emphasised in the WMS, the efficient and effective delivery of justice will remain an important responsibility of the state.
3. Justice cannot be delivered efficiently and effectively unless judiciary and the HMCTS, as the court administration, work together. A key advantage of the present arrangements therefore lies in the integrated working of Judiciary and HMCTS, nationally and locally. Such cooperation is exemplified in the working of the present HMCTS Board.
4. The weakness of the present arrangements are several and include the following:

HMCTS is required to look two ways – to the MoJ (the LC) as well as the LCJ;  
The role of the Lord Chancellor has changed and is continuing to evolve;  
The MoJ is a sizeable department, with priorities other than the Judiciary and the Courts;  
The constitutional reforms began in 2003-5 remain unfinished;  
HMCTS is unable to raise capital and does not enjoy security of funding;  
HMCTS is tied to MoJ central contracting, so inhibiting its top managers' freedom to manage.

### Governance

5. The Judiciary sees the need for an HMCTS (or successor body, "New CTS") independent of direct ministerial control, of course with appropriate safeguards reflecting the matters referred to in para. 2 above.
6. Indeed, if New CTS is to be free to raise revenue and attract (private sector) capital investment it must be independent of ministerial control and a new way found to protect the public interest: see paragraph 12 below.
7. Should New CTS fail, HMG must have appropriate reserve powers to intervene and should be clearly committed by statute to provide adequate Court and Tribunal services in this eventuality.
8. It is essential that the Judiciary is involved in the governance of New CTS, at all levels,

to recognise and build upon the integrated working of the Judiciary and HMCTS in the management, delivery and improvement of an efficient and effective service. Performance issues should be addressed within the contemplated integrated working model; such consideration would take into account tensions in such a way so as to ensure that the interests of justice are paramount. A memorandum containing some of the provisions of the Framework Agreement may well be the best way of setting this out.

9. Given the pressures to which New CTS may be subject as a wholly independent entity raising capital in the private sector, consideration should be given to an appropriate dispute resolution mechanism should there be any failure to achieve unanimity at Board level.
10. Internal arrangements concerning the leadership and management of the Judiciary must remain with the Judiciary. The Judicial Office would continue to have a major and perhaps an enhanced role, though the position in the organisational structure of at least some of its functions might require revisiting depending on the governance arrangements for New CTS.
11. So far as the Magistracy is concerned, its unique characteristics as a voluntary body of lay judicial office holders must be preserved; so too, the independence of the legal advice it receives.
12. New CTS must operate in the public interest. In order to do so, New CTS will require adequate funding (see below). Whatever the precise governance model, the Membership of New CTS corporate entity and its Board should appropriately reflect the public interest, the Judiciary and the LC (to the extent that the MoJ remains residually involved).

The Board should build on the successes of the present HMCTS Board; it will require an independent Chairman of public stature (commanding respect from Whitehall, Westminster, the City and the Judiciary) and a first rate Chief Executive, tough and independent minded. The Chief Executive should be accountable, on a day to day basis, to the board and, in respect of broader matters of policy affecting the judiciary, to the LCJ; the chief executive will not be directly involved in the day to day management of New CTS. It will be necessary to guard against any significant increase in the management responsibilities of “leadership” judges.

13. All Ministers and the LC will retain their respective obligations to uphold the rule of law and the independence of the Judiciary, as set out in the CRA 2005. Furthermore, the LC would retain his current statutory obligations to furnish sufficient Judges (for both Courts and Tribunals) through the independent appointments process as at present. The salaries of all Judges, other than fee paid Judges, would either continue to be paid or would in future be paid out of the Consolidated Fund.
14. Arrangements would need to be negotiated between New CTS and the MoJ (and other government departments) in relation to the costs of services provided to them and the terms on which such services would be provided; this agreement should also cover the consequences of matters such as workload increases or reductions, consequent upon changes in government policy (for example, a dramatic increase or reduction in tribunal workload flowing from legislative change).
15. It is to be anticipated and welcomed that New CTS must be accountable in some form

to Parliament; for instance, there is likely to be a wider public interest in the setting of fees. Primarily and ordinarily, the Chairman and Chief Executive should be accountable. The present arrangements in relation to the LCJ should remain broadly unchanged.

Urgent and serious consideration is required as to the form such accountability should take and what it should cover. Any form of accountability to Parliament should be constitutionally appropriate; one possibility is a non-partisan Joint Committee of both Houses.

#### Viability

16. Acute issues of principle and practicality surround the ability of New CTS to cross-subsidise parts of the system by a surplus from fees charged in other parts where the expenditure on those parts exceeded the revenue from fees. Such issues arise in particular as to the principled (or moral) justification for increasing fees in civil cases in order to make a contribution to the costs of criminal courts, including the Court of Appeal Criminal Division – in addition to the unknowns and risks as to market acceptance and the level at which fees would drive away business. The Judiciary is anxious to underline the importance and sensitivity of this topic (going back to the prohibition in Magna Carta on “selling justice”) while understanding that the question does not admit of a single or simplistic answer. Much may turn on the work being done in this area by McKinseys in relation to the market (and its differing segments). Moreover, the Judiciary appreciates that in some areas there is room to raise fees simply to cover costs and well before achieving a surplus.
17. The Judiciary retains an open and receptive mind with regard to other proposals for generating revenue, currently under consideration by McKinseys. For instance, there are no principled objections to the appropriate utilisation of the HMCTS estate so as to generate revenue or for HMCTS to take the lead role in enforcement, including enforcing all civil judgments. Equally, a more determined approach may reveal proper opportunities for direct export-led revenue, capitalising on the worldwide reputation of the Judiciary and the UICS reputation as a world leader in legal services and dispute resolution.
18. Overall, putting to one side principled questions as to cross-subsidisation flagged above, the need is for a realistic assessment of the true potential the various proposals as to recovery of criminal costs, new revenue streams and the reduction in costs flowing from estate rationalisation and the like. The touchstone for such proposals is likely to be one of realism and practicality rather than principle. Unless New CTS is viable, the proposed reforms will still-born. To the extent that public funding continues to be required (in particular for the criminal justice system), it will be necessary to reconcile this requirement with the need for New CTS to be independent of ministerial control so as to be free to raise revenue and attract capital investment. The Judiciary will continue to remain fully engaged with HMCTS, Slaughter and May, McKinseys, MOJ and other government departments as work progresses on these matters.

#### Transitional arrangements

19. Transitional arrangements and mechanisms will require close and careful attention. First, decisions will need to be made as to the manner of “launching” New CTS. Secondly, there will need to be detailed negotiations as to which assets and liabilities

are taken over by New CTS. Thirdly and on any View, over the transitional period there can be no question of New CTS doing without significant State funding.

A package

20. The Judiciary's interest in the proposals foreshadowed in the WMS is contingent on their constituting a package. Thus, for example, the risks involved in moving to an independent New CTS would be most unlikely to commend themselves to the Judiciary (or, for that matter, Parliament), absent clear constitutional and public interest dimensions in the proposals as a whole.

This Note

21. This Note does not purport to be exhaustive of all the matters canvassed or yet to be canvassed; it is no more than an Overview. It is current as of 8th May and will, no doubt, require updating as negotiations proceed.

Gross LJ Senior Presiding Judge

8th May, 2013